FILED
FEB 2 - 2004
OFFICE OF THE CLERK

No. 03-1119

IN THE

Supreme Court of the United States

DONALD E. MORRIS,
Petitioner,

v.

DONALD H. RUMSFELD, Secretary,
United States Department of Defense,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when said intermediate Court has determined that the Petitioner's impairment of epilepsy should not be considered a disability under the Rehabilitation Act in accordance with *Sutton v. Lader*, 185 F.3d 1203 (11th Cir. 1999).

2. Whether the Eleventh Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers, when said intermediate Court has failed to follow precedent as established in *Cox v. Administrator U.S. Steel and Carnegie*, 17 F.3d 1386, opinion modified on rehearing, 30 F. 3d 1347 (11th Cir. 1994).

3. Whether the Eleventh Circuit's decision conflicts with this Court's decisions in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 156 L.Ed. 2d 84 (2003).

PARTIES, PARENT COMPANIES, AND SUBSIDIARIES

In compliance with the provisions of Rule 14.1(b), the Petitioner represents to the Court that Rule 29.6 is not applicable to this case because the Defendant is a public official of the government of the United States. Also, all of the parties to the proceeding are named in the caption of the case.

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CITATIONS OF OPINIONS AND ORDERS

The opinions and orders of the United States District Court for the Middle District of Alabama are not reported, and are set out at Appendix C (App. 13a) and Appendix D (App. 38a). The order of the Court denying rehearing is not reported, but set out at Appendix E (App.39a).

The opinion of the Eleventh Circuit Court of Appeals is reported at 82 F. Appx. 215, (Table/2003 WL 22075714 (11th Cir. [Ala.]), August 15, 2003 and is set out at Appendix A (App. 1a), and the decision of that Court on rehearing is set out at Appendix F (App. 41a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated August 15, 2003, and the decision on rehearing and rehearing *en banc* is dated November 3, 2003.

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. §1254(1). Rule 10(a) of the Rules of this Court provides for review of a United States Court of Appeals' decision that has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Rule 10(c) also provides for review in this Court of decisions of the Courts of Appeals that have decided important questions of federal law in a way that conflicts with relevant decisions of this Court.

This case involves questions within those standards through issues as to whether the Court of Civil Appeals has erroneously upheld the issuance of summary judgment when the Petitioner has refuted those reasons proffered by the Respondent, thereby challenging the credibility of such reasons.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

5 U.S.C. § 2301; 5 U.S.C. § 2302(b)(8); 5 U.S.C. §7701; 5 U.S.C. § 7702; 29 U.S.C. § 621, *et. seq.*; (*see* App. G, 42a-60a); 29 U.S.C. § 794, *et. seq.*; 42 U.S.C. § 12101, *et. seq.*

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

This case was initially filed on March 23, 2001, by Donald E. Morris against Donald H. Rumsfeld, Secretary, United States Department of Defense, to seek redress for action violative of the provisions of the Americans with Disabilities Act,[1] 42 U.S.C. §12101 *et seq.*, for action violative of the provisions of the Age Discrimination in Employment Act, 29 U.S.C. §621, *et. seq.*, for action violative of the Rehabilitation Act of 1974, 29 U.S.C. §794 *et. seq.*, and for action violative of reprisal for whistle-blowing, 5 U.S.C. § 2301. (R1-1). This case consists of allegations permitted under the "mixed case complaint" provisions of 5 U.S.C. §§ 7701-7702. (R1-1, 6, 7, 8).

The Defendant, Donald H. Rumsfeld, as Secretary, United States Department of Defense, filed an Answer (R1-11), and a motion to dismiss, or in the alternative for summary judgment, (R1-22), later supplementing that motion. (R2-32). The Plaintiff responded to that supplemented motion (R2-39), and the trial court entered summary judgment for the Defendants on December 4, 2002. (R2-45). A timely post-trial motion under Rule 59 was filed on December 18, 2002 (R3-47), which was subsequently denied on January 2, 2003. The Plaintiff timely filed his Notice of Appeal on January 14, 2003. (R3-49).

An Eleventh Circuit panel decision, upheld, *per curiam*, the District Court's ruling on August 15, 2003, and denied Petitioner's Application for Rehearing on November 3, 2003.

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[1] In its memorandum order of August 15, 2003, the appellate court held that a federal employee has no remedy for employment discrimination under ADA.

STATEMENT OF FACTS [2]

At the age of 50, Plaintiff Morris began employment with the Defense Commissary Agency ("DeCA") at its inception in 1991. In 1992, Morris was diagnosed with epilepsy. The DeCA, an agency within the Department of Defense, is responsible for managing the federal government's commissaries. During his employment with DeCA, Morris worked in several supervisory positions, most recently as the Zone Manager for the Eastern Division of the Southern Region. As Zone Manager, Morris supervised eleven commissaries and eight commissary officers in Alabama, Georgia, and Tennessee, and worked out of an office at Maxwell Air Force Base, Alabama.

Beginning in approximately January 1998, Morris's immediate supervisor was Owen Chet Boutelle. In July 1998, Boutelle completed Morris's performance evaluation and rated him as having "exceeded" expectations in five "critical" areas of his job responsibilities. After that, Morris's performance evaluations worsened, prompting him to file several grievances and EEO complaints.

In January 1999, supervisor Boutelle completed a mid-year evaluation of Morris. The form contained two possible ratings, "acceptable, or better" and "less than acceptable." Boutelle rated Morris as "acceptable, or better" and circled the word "better." However, Boutelle noted that Morris needed to watch his overtime usage and improve in the areas of produce and meat accountability. Morris disagreed with Boutelle's assessment and filed an informal grievance against Boutelle seeking to have the comments removed from his personnel file.

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[2] Excerpt as otherwise indicated, the facts herein reported are essentially drawn from those recited by the appellate court in its memorandum order of August 15, 2003, supporting is judgment in favor of the Defendants as to all claims, with insubstantial changes.

In February 1999, Boutelle sent an e-mail to Morris stating that payrolls at Morris's stores were excessive and "out of control." Two months later, in April 1999, Morris and Boutelle disagreed on a personnel matter regarding a managerial staff member at a commissary under Morris's control. As a result of this disagreement, Morris sent an e-mail to Boutelle in which Morris stated that Boutelle's decision was "the epitome of micro-management in anyone's book."

On April 23, 1999, Boutelle gave Morris a Memorandum of Warning, to reprimand him for his "confrontation" e-mail and "lack of respect" for Boutelle's decision-making authority. Further, Boutelle stated his concern about Morris's "continued lack of accessibility" and the fact that "[t]here ha[d] been numerous occasions over the past few months" when staff members were unable to contact Morris. Also on April 23, 1999, Boutelle presented Morris with a Warning of Unacceptable Performance and Notice of Opportunity to Demonstrate Acceptable Performance ("PIP"). The PIP was based on two allegedly deficient areas of Morris's job performance. First, one of Morris's stores recently had received a low inspection rating. Second, "four to six stores" under Morris's charge had inventory losses exceeding those allowable under the applicable regulations and, thus, were "out of tolerance." The PIP stated that Morris had 90 days to fix the performance issues, and that at the end of the 90-day period, Boutelle would update Morris as to the status of his performance. The PIP further stated that if Morris did not improve, Boutelle would take formal action, including reassignment, demotion, or removal.[3]

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[3] At the same time that Boutelle gave Morris the PIP, Boutelle also gave a PIP to Bonnie Kanitz, another Zone Manager. Kanitz's zone also was "out of tolerance." Kanitz's PIP contained identical language to Morris's PIP with respect to the action Boutelle might take if Kanitz's performance remained unsuccessful. At the end of the 90-day period, Kanitz's zone was determined to be within tolerance, and she received no further action.

After Boutelle gave Morris the PIP, Morris filed two informal grievances with Boutelle, one regarding the PIP and one regarding the Memorandum of Warning. Essentially, Morris stated his belief that the PIP and the Memorandum of Warning were efforts to force him to retire and were in retaliation for the informal grievance he had lodged after his 1999 mid-year evaluation. Morris eventually filed formal grievances and an EEO complaint regarding the PIP and the Memorandum of Warning. In his EEO complaint, Morris stated his belief that he was being discriminated against based on his age. In 1999, Morris was 58 years old.

On May 4, 1999, Morris filed an informal grievance with Charles M. Wiker, Boutelle's immediate supervisor, stating that Wiker himself had behaved in a "rude, embarrassing and humiliating" manner toward Morris during a confrontation on May 3, 1999, in front of one of Morris's commissary stores. Morris also filed a formal grievance regarding the incident.

On May 14, 1999, Morris filed a grievance with the DeCA Inspector General in which he set forth complaints about his superiors' "threatening" and "intimidating" behavior, as well as their "rude and offensive language." Further, Morris reported that he knew of (1) managers abusing their position in the selection of individuals for jobs, (2) one manager who coerced a commissary officer into buying tax-free cigarettes, and (3) one area vice president who was aware of misuse of a vehicle and did nothing about it.

On July 30, 1999, Boutelle extended Morris's PIP by 30 days, stating that he was concerned that Morris's "use of leave during this opportunity period," which had been greater than normal due to family issues, "will not allow a fair assessment of your progress."[4] At the conclusion of the 30-day period, Boutelle still was not satisfied with Morris's

[4] On August 30, 1999, Morris filed an EEO complaint alleging that the extension of the PIP program was a result of age discrimination.

performance, and he issued Morris a "Notice of Proposed Demotion," recommending that Morris be demoted temporarily to a non-supervisory position. Morris retained his grade and salary, and his position of record did not change.

As a result of his temporary demotion, Morris began working for Robert Vitikacs on October 12, 1999.[5] On November 15, 1999, Morris submitted a written request for sick leave from November 12, 1999, through November 26, 1999. Vitikacs disapproved the leave request, stating that Morris had not submitted adequate medical documentation. Morris then provided a medical excuse, which Vitikacs rejected. On November 22, 1999, based on additional information from Morris's physician, Vitikacs approved the request and granted Morris leave until November 30, 1999.[6] Rather than return to work, however, Morris gave Vitikacs a written notice on November 29, 1999, that he was retiring effective November 30, 1999.[7]

In addition to the foregoing facts, Morris contends that at management meetings, Boutelle questioned various individuals, including Morris, about their retirement plans. Morris alleges that, when discussing retirement plans, Boutelle would "look right at [him]," which indicated to Morris that Boutelle "was sending [him] a signal that he wanted [Morris]

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[5] On October 13, 1999, Morris filed a compliant with the Office of Special Counsel in Washington D.C., claiming that his demotion was in "reprisal for whistleblowing actions." Morris also filed an EEO complaint regarding his temporary demotion. This EEO complaint was consolidated with his August 30, 1999, EEO complaint.

[6] During the timeframe that Morris worked for Vitikacs, Boutelle denied Morris a within-grade pay increase because Morris did not have a fully successful or better rating of record for the last performance appraisal cycle.

[7] In December 1999, Morris amended his August 30 and October 13 EEO complaints to contain a claim of constructive discharge. At this time, Morris referenced not only his age, but also his epilepsy.

to retire." Further, Morris contends that his epilepsy was a cause of the unfavorable treatment he received. Morris first revealed his condition to DeCA in 1998 when he submitted a form to his supervisor, who preceded Boutelle, and to the Defense Logistics Agency. Then, in August 1999, Morris forwarded the same form to the personnel department at Maxwell Air Force Base. Morris never discussed his epilepsy with Boutelle, but speculates that Boutelle know about it.[8]

JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals for the Eleventh Circuit had jurisdiction of this cause in the first instance under 42 U.S.C. § 1291 because it involved an appeal from a decision of a United States District Court sitting within its Circuit.

ARGUMENT

I. REHABILITATION ACT

According to the Eleventh Circuit's own precedent, a *prima facie* case under the Rehabilitation Act is made upon the plaintiff showing "(1) he has a disability; (2) he is otherwise qualified for the position; and (3) he was subjected to unlawful discrimination as the result of his disability." *Sutton v. Lader*, 185 F.3d 1203, 1207 (11th Cir. 1999). The Petitioner has most certainly demonstrated that his condition of epilepsy along with the underlying facts, as applied to *Sutton,* without question qualifies as a disability under the Rehabilitation Act.

For an impairment to be classified as a "disability" under the first requirement of *Sutton*, the Petitioner would have to show (1) that a physical or mental impairment exists that substantially limits one or more major life activities, (2) that person "has a record of such impairment," or (3) the person

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[8] Boutelle, Wiker, and Vitikacs claim that they did not know that Morris suffered from epilepsy.

"is regarded as having such an impairment." *Sutton* at 1208, *citing* 29 U.S.C. §706(8)(B). Though Petitioner has clearly set forth evidence demonstrating that his impairment is classifiable as a disability under at least two if not all three of the possibilities, the Eleventh Circuit has refused to accept such evidence as sufficient.

With regard to the first avenue of establishing the existence of a disability, there exists no question that the Petitioner's condition of epilepsy is an impairment falling within the universal definition of a disability that would limit one or more major life activities, as it is defined as being "a disorder of the nervous system, characterized either by mild, sporadic loss of attention or sleepiness, or by severe convulsions with loss of consciousness." *See* Random House Webster's Unabridged Dictionary (1997). Similarly, it is defined in the Oxford World Encyclopedia (2001) as follows:

> Disorder characterized by abnormal electrical discharges in the brain which provoke seizures. It is seen both in generalized forms, involving the whole of the CEREBRAL CORTEX, or in the partial (focal) attacks arising in one small part of the brain. Attacks are often presaged by warning symptoms, the "aura". Seizure types vary from the momentary loss of awareness seen in *petit mal* attacks ("absences") to the major convulsion of *grand mal* epilepsy. They may be triggered by a number of factors, including sleep deprivation, flashing lights or excessive noise. All forms of epilepsy are controlled with anticonvulsant drugs.

Gould's Medical Dictionary defines "epilepsy" as follows:

> A disorder of the brain characterized by a recurring excessive neuronal discharge, manifested by transient episodes of motor, sensory, or psychic dysfunction, with or without unconsciousness or convulsive movements. The seizure is associated with marked changes in recorded electrical brain activity.

In addition, epilepsy is normally considered an impairment qualifying as a disability under 42 U.S.C. §12101, *et seq.* *See* 42 U.S.C. §12102, n. 13.

Despite undisputed evidence that the Petitioner's direct supervisor was provided with documentation outlining Petitioner's medical condition of epilepsy, the Eleventh Circuit held that the Petitioner failed to show the existence of disability under the definition of disability. Logic would seem to allow such documentation to be characterized as having a "record of such impairment". In fact, the Respondent concedes that in 1998 and 1999, the Petitioner sent facsimile messages to DLA, Boutelle, and to the personnel office, informing such parties of his condition. (R1-23-47). However, though the Respondent concedes that such messages were indeed sent, the Respondent apparently argues in essence that such were not read or interpreted by Boutelle, Wiker, nor Vitikacs, and therefore the Petitioner should be estopped from asserting that he had made the necessary parties aware of his condition sufficiently enough to entitle him to have made a "record of such impairment". The Eleventh Circuit has refused to accept such messages as qualifying as a "record", though Petitioner has shown that such record was sent and that the Respondent admits receiving such record.

The Petitioner also qualifies for the third possibility, that being "regarded as having such impairment". Certainly there is sufficient evidence for a reasonable person to conclude that Morris' condition and detailed medical record, along with the universal understanding of epilepsy itself, would cause him to be "regarded" as being impaired.

II. ADEA, TITLE VII, AND WHISTLEBLOWER CLAIMS

All parties, as well as the Eleventh Circuit concede, that the Petitioner has established a *prima facie* case of age discrimination under the ADEA and of retaliation under the

ADEA, Title VII, and 5 U.S.C. §2302(b)(8). In offering his reasons to discredit the Respondent's articulations of justification, the Petitioner demonstrated that such proffered reasons were merely a pretext for discrimination. Those reasons, as offered by the Respondent, include (1) allegations of poor performance when evidence supported a history of good performance, (2) complaints that his stores were "out of performance" when documentation proved otherwise, and (3) failure to properly supervise and control his commissary officers, when all such officers were rated as either "outstanding" or "excellent" by Boutelle and Wiker themselves. Such inconsistencies in the evidence can support a conclusion that a genuine issue of fact exists. *See McShane Contracting Co. v. Fidelity and Guaranty Co.*, 61 F.R.D. 428 (D.C.P.A. 1973).

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court held that when an employer asserts reasons that are made subject to credibility issues, summary judgment is inappropriate. *See also Cox v. Administrator U.S. Steel and Carnegie*, 17 F.3d 1386, *opinion modified on rehearing*, 30 F.3d 1347 (11th Cir. 1994) (If a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact, a court should deny a motion for summary judgment). Courts are prohibited from weighing the evidence and must deny the motion if the evidence, including all inferences therefrom, is such that a finder of fact could decide the material issues in favor of the non-moving party. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). This Court has most recently held in *Desert Palace, Inc. v. Costa*, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), that direct evidence of discrimination is not required in order to prove employment discrimination in mixed-motive cases under Title VII. *Id.*

Clearly the proffered reasons call into question the credibility of the Respondent's asserted defenses, when facts were in issue plainly and without question refuting the offered defenses. However, the Eleventh Circuit has concluded that while each proffered justification by the Respondent was refuted by Petitioner with unquestionable documentation, those proffered reasons remain invulnerable to credibility issues. Certainly this Court, under the *Reeves* rationale, would not allow the proffered reasons offered by the Respondent to remain immune from credibility issues. The Eleventh Circuit has erred in upholding the District Court's order on summary judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Court should grant this petition and issue it a Writ of Certiorari to the United States Court of Appeals requiring it to review its decision, reverse the judgments of the district court, and remand the case to that court for further proceedings.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 15, 2003]

No. 03-10283

D.C. Docket No. 01-00342-CV-D-N

DONALD E. MORRIS,
Plaintiff-Appellant,

versus

DONALD H. RUMSFELD, Secretary,
United States Department of Defense,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

Before TJOFLAT, BIRCH, and HULL, *Circuit Judges.*

PER CURIAM:

Plaintiff-Appellant Donald E. Morris brought this employment discrimination suit against Donald H. Rumsfeld, the Secretary of the United States Department of Defense, alleging violations of (a) the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-34, (b) the Rehabilitation Act of 1973, 29 U.S.C. § 794(a),[1] (c) the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3,

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[1] In his brief on appeal Morris also references the Americans with Disabilities Act, but as a federal employee, he has no remedy for employment discrimination under that statute. *See* 42 U.S.C. § 12111(5)(B)(i).

and (d) 5 U.S.C. § 2302(b)(8), which prohibits retaliation for whistle-blowing. The district court granted summary judgment to Defendant-Appellee Rumsfeld. After review, we affirm.

I. BACKGROUND

Plaintiff Morris began employment with the Defense Commissary Agency ("DeCA") at its inception in 1991. When Morris began employment with the DeCA in 1991, he was 50 years old. In 1992, Morris was diagnosed with epilepsy. The DeCA, an agency within the Department of Defense, is responsible for managing the federal government's commissaries. During his employment with DeCA, Morris worked in several supervisory positions. Most recently, Morris worked as the Zone Manager for the Eastern Division of the Southern Region. As Zone Manager, Morris supervised eleven commissaries and eight commissary officers in Alabama, Georgia, and Tennessee, and worked out of an office at Maxwell Air Force Base, Alabama.

Beginning in approximately January 1998, Morris's immediate supervisor was Owen Chet Boutelle. In July 1998, Boutelle completed Morris's performance evaluation and rated him as having "exceeded" expectations in five "critical" areas of his job responsibilities. After that, Morris's performance evaluations worsened, prompting him to file several grievances and EEO complaints.

In January 1999, supervisor Boutelle completed a mid-year evaluation of Morris. The form contained two possible ratings, "acceptable, or better" and "less than acceptable." Boutelle rated Morris as "acceptable, or better" and circled the word "better." However, Boutelle noted that Morris needed to watch his overtime usage and improve in the areas of produce and meat accountability. Morris disagreed with Boutelle's assessment and filed an informal grievance against Boutelle seeking to have the comments removed from his personnel file.

In February 1999, Boutelle sent an e-mail to Morris stating that payrolls at Morris's stores were excessive and "out of control." Two months later, in April 1999, Morris and Boutelle disagreed on a personnel matter regarding a managerial staff member at a commissary under Morris's control. As a result of this disagreement, Morris sent an e-mail to Boutelle in which Morris stated that Boutelle's decision was "the epitome of micro-management in anyone's book."

On April 23, 1999, Boutelle gave Morris a Memorandum of Warning, to reprimand him for his "confrontational" e-mail and "lack of respect" for Boutelle's decision-making authority. Further, Boutelle stated his concern about Morris's "continued lack of accessibility" and the fact that "[t]here ha[d] been numerous occasions over the past few months" when staff members were unable to contact Morris. Also on April 23, 1999, Boutelle presented Morris with a Warning of Unacceptable Performance and Notice of Opportunity to Demonstrate Acceptable Performance ("PIP"). The PIP was based on two allegedly deficient areas of Morris's job performance. First, one of Morris's stores recently had received a low inspection rating. Second, "four of six stores" under Morris's charge had inventory losses exceeding those allowable under the applicable regulations and, thus, were "out of tolerance." The PIP stated that Morris had 90 days to fix the performance issues, and that at the end of the 90-day period, Boutelle would update Morris as to the status of his performance. The PIP further stated that if Morris did not improve, Boutelle would take formal action, including reassignment, demotion, or removal.[2]

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[2] At the same time that Boutelle gave Moms the PIP, Boutelle also gave a PIP to Bonnie Kanitz, another Zone Manager. Kanitz's zone also was "out of tolerance." Kanitz's PIP contained identical language to Morris's PIP with respect to the action Boutelle might take if Kanitz's performance remained unsuccessful. At the end of the 90-day period, Kanitz's zone was within tolerance, and she received no further action.

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On May 4, 1999, Morris filed an informal grievance with Charles M. Wiker, Boutelle's immediate supervisor, stating that Wiker himself had behaved in a "rude, embarrassing and humiliating" manner toward Morris during a confrontation on May 3, 1999, in front of one of Morris's commissary stores. Morris also filed a formal grievance regarding the incident.

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In addition to the foregoing facts, Morris contends that at management meetings, Boutelle questioned various individuals, including Morris, about their retirement plans. Morris alleges that, when discussing retirement plans, Boutelle would "look right at [him]," which indicated to Morris that Boutelle "was sending [him] a signal that he wanted [Morris] to retire." Further, Morris contends that his epilepsy was a

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[5] During the timeframe that Morris worked for Vitikacs, Boutelle denied Morris a within-grade pay increase because Morris did not have a fully successful or better rating of record for the last performance appraisal cycle.

[6] In December 1999, Morris amended his August 30 and October 13 EEO complaints to contain a claim of constructive discharge. At this time, Morris referenced not only his age, but also his epilepsy.

cause of the unfavorable treatment he received. Morris first revealed his condition to DeCA in 1998 when he submitted a form to his supervisor, who preceded Boutelle, and to the Defense Logistics Agency. Then, in August 1999, Morris forwarded the same form to the personnel department at Maxwell Air Force Base. Morris never discussed his epilepsy with Boutelle, but speculates that Boutelle knew about it.[7]

II. PROCEDURAL HISTORY

In April 2001, Morris filed his complaint alleging several adverse employment actions, including (1) the 1999 mid-year evaluation, (2) the PIP, (3) the 30-day PIP extension, (4) the temporary demotion, (5) the denial of a within-grade pay increase, (6) the requirement that Morris submit additional documentation supporting his request for medical leave, and (7) constructive discharge. Morris made four claims regarding these employment actions, alleging that they were (1) based on his age in violation of the ADEA, (2) based on his epilepsy in violation of the Rehabilitation Act, (3) in retaliation for his filing grievances and EEO complaints in violation of Title VII and the ADEA, and (4) in retaliation for federal whistleblowing acts. The district court granted summary judgment to defendant Rumsfeld, and Morris timely appealed.

III. DISCUSSION [8]

A. Rehabilitation Act Claim

On appeal, Morris argues that the district court erred in determining that his epilepsy was not a disability under the Rehabilitation Act.

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[7] Boutelle, Wiker. and Vitikacs claim that they did not know that Morris suffered from epilepsy.

[8] "We review *de novo* a district court's grant of summary judgment, applying the same legal standards as the district court." *Chapman v. Al Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (*en banc*).

In order to present a prima facie case under the Rehabilitation Act, a plaintiff must show that "(1) he has a disability; (2) he is otherwise qualified for the position; and (3) he was subjected to unlawful discrimination as the result of his disability." *Sutton v. Lader*, 185 F.3d 1203, 1207 (11th Cir. 1999). An individual has a disability under the Rehabilitation Act if he (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) "has a record of such impairment,"[9] or (3) "is regarded as having such an impairment."[10] Id at 1208 (citing 29 U.S.C. § 706(8)(B)). A major life activity is a "function[] such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. 1630.2(i).

In this case, Morris is unable to show that his epilepsy constituted a disability under any of the three prongs of the definition of disability. While it is undisputed that Morris has epilepsy and that epilepsy is a physical impairment, Morris has failed to identify even a single major life activity that his epilepsy substantially limits. In fact, Morris conceded in his deposition that he is able to drive a car, do household chores,

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[9] A record of such impairment means having a history of, or having been misclassified as having, a physical or mental impairment that substantially limits a major life activity. 29 C.F.R. § 1630.2(k).

[10] One "is regarded as having such an impairment" if the individual:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation:
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in . . . this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1).

and take care of his daily needs. Moreover, he stated that his epilepsy did not really affect his ability to do his job. Further, Morris's epilepsy is controlled by medication, and corrective measures must be considered when determining whether a plaintiff is "disabled." *Cash v. Smith*, 231 F.3d 1301, 1305-06 n.4 (11th Cir. 2000) (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999)).[11] Thus, Morris does not meet the first alternative of the definition of disability.

Additionally, there is no evidence that Morris had a "record of such impairment." Although Morris submitted a form to the Defense Logistics Agency and the Maxwell Air Force Base personnel office indicating that he had epilepsy, there is no evidence that his epilepsy substantially limited a major life activity or that the form indicated such.

Finally, there is no evidence that Morris was "regarded as" having a disability by his superiors. To meet the "regarded as" prong of the definition of disability, Morris must show that DeCA considered him "'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.' *Cash*, 231 F.3d at 1306 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). Here, there is no evidence that anyone at DeCA considered Morris to be restricted in his ability to perform a class of jobs or a broad range of jobs. Although Boutelle may have considered Morris unable to perform one specific supervisory position, there is no evidence that Boutelle considered him restricted in his ability to perform a class of jobs or a broad range of jobs.

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[11] "The standard for determining liability under the Rehabilitation Act is the same as that under the ADA." *Sutton v. Lader*, 185 F.3d 1203, 1207-08 n.5 (11th Cir. 1999). Therefore, ADA cases are precedent for Rehabilitation Act cases. *Cash v. Smith*, 231 F.3d 1301, 1305 n.2 (11th Cir. 2000).

C. ADEA, Title VII, and Whistleblower Claims

Rumsfeld conceded in the district court that Morris presented a prima facie case (using the circumstantial evidence burden-shifting framework) of age discrimination under the ADEA and of retaliation under the ADEA, Title VII, and 5 U.S.C. § 2302(b)(8). On appeal, Morris contends that Rumsfeld's proffered non-discriminatory reasons for the actions against Morris, primarily that Morris exhibited poor performance and that his stores were out of tolerance, were pretextual.[12]

If a plaintiff establishes a prima facie case of discrimination and/or retaliation, "the defendant employer must articulate a legitimate, nondiscriminatory reason for the challenged employment action." *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*) (discrimination

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[12] Morris also argues that the district court erred in determining that Boutelle 's inquiries about retirement did not constitute direct evidence of age discrimination. We disagree. "[E]vidence of age discrimination is direct when, if believed, it establishes discriminatory intent without inference or presumption." *Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993) (citing *Earley v. Champion Intl Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990)). "Only the most blatant remarks whose intent could only be to discriminate on the basis of age constitute direct evidence." *Clark*, 990 F.2d at 1226.

In this case, Boutelle's comments only referred to retirement, and not to age, and the inquiries did not contain blatant discriminatory intent. Indeed, the remarks in this case are less egregious than those in *Clark*, where we rejected a purported direct evidence claim. In *Clark*, a plant manager told a 58-year-old employee that he had to accept early retirement effective immediately. 990 F.2d at 1221, 1226. This Court concluded that the statement was not direct evidence because it was not accompanied by any reason as to "why he had to retire." Id. Thus, the "discriminatory intent motivating that decision must be inferred." Id. Similarly, in this case, there is at most direct evidence that Boutelle hoped Morris would retire, but an inference is required to conclude that Boutelle's questions about retirement were based on any discriminatory intent.

under the AREA); *see also Betchel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 934 (11th Cir. 1995) (whistleblower retaliation claim under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851);[13] *Hairston v. Gainesville Sun Publ'g. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (retaliation under the ADEA). Once the defendant articulates a legitimate non-discriminatory reason for the challenged action, the plaintiff must show that the reason is pretext for discrimination. *Chapman*, 229 F.3d at 1024-25; *Betchel*, 50 F.3d at 934; *Hairston*, 9 F.3d at 919.

Morris first argues that despite Boutelle's allegations of poor performance by Morris, he always performed satisfactorily, as evidenced by his history of good performance evaluations and compliments from supervisors on the appearance of his stores. Morris further claims that his stores were not "out of tolerance." Morris's problem is that his assertions are conclusory and unsubstantiated. *See Holifield v. Reno*, 115 F.3d 1555, 1564 n.6 (11th Cir. 1997) (stating that plaintiff's conclusory allegations, without supporting evidence, were insufficient to withstand summary judgment). Although Morris states that his performance was satisfactory and his stores were in tolerance, Morris fails to submit any evidence, other than statements in his own deposition, in support of his argument that the stores in his zone were in tolerance and that his performance was satisfactory when he received the PIP. In contrast, the defendant has provided evidence pointing to unsatisfactory performance by Morris.

Morris also argues that Boutelle's comments about retirement constitute evidence of pretext. However, Morris failed

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[13] As noted in the text, this Court has applied the burden-shifting framework to retaliation claims under federal whistleblower protection statutes before, but has never specifically determined that the burden-shifting analysis is applicable to cases under 5 U.S.C. § 2302(b)(8). Because neither party contests the district court's use of the burden-shifting analysis, we need not decide this issue.

to rebut the defendant's contention that Boutelle asked about retirement as a way to anticipate future staffing needs, and there is nothing per se discriminatory about an employer's reasonable questions regarding an employee's retirement plans. *See Montgomery v. John Deere & Co.*, 169 F.3d 556, 560 (8th Cir. 1999) (stating that "an employer may make reasonable inquiries into the retirement plans of its employees and that a plaintiff should not be able to rely on those inquiries to prove intentional discrimination"). Further, Morris stated that while he believed the comments were thinly veiled requests for his retirement, the comments were not necessarily directed at him. In short, although Morris stated numerous arguments to show pretext, Morris failed to present sufficient evidence to substantiate any of them.

Finally, Morris appears to argue that the fact that Vitikacs sought more documentation for Morris's leave than was required is evidence of pretext. However, Morris failed to rebut Vitikacs's statement that Vitikacs only requested the medical documentation required for long medical absences. Further, Morris did not show that any other employees took similar leave without providing such documentation.

III. CONCLUSION

For all of the above reasons, we affirm the district court's grant of summary judgment in favor of the defendant.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Aug. 15, 2003]

No. 03-10283

District Court Docket No. 01-00342-CV-D-N

DONALD E. MORRIS,
Plaintiff-Appellant,

Versus

DONALD H. RUMSFELD, Secretary,
United States Department of Defense,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 15, 2003.

FOR THE COURT

/s/ Thomas K. Kahn, Clerk
By /s/ Jackson, Jarvis

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALARAMA
NORTHERN DIVISION

[Filed Dec. 4, 2002]

CIV. A. No. 01-D-342-N

DONALD E. MORRIS,

Plaintiff,

v.

DONALD H. RUMSFELD, Secretary,
United States Dep't of Defense,

Defendant.

MEMORANDUM OPINION AND ORDER

Before the court is Defendant Donald H. Rumsfeld's Motion For Summary Judgment and Memorandum Brief, filed September 5, 2002, and supplemented on September 17, 2002. (Doc. Nos. 22, 23, 26, 31-33.) Plaintiff Donald E. Morris filed a timely Response on October 9 (Doc. No. 39), to which Defendant submit-ed a Reply on October 16.[1] (Doc. No. 41.) After careful consideration of the arguments of counsel, the relevant law, and the record as a whole, the court finds that Defendant's Motion is due to be granted.

I. JURISDICTION AND VENUE

The court exercises subject matter jurisdiction over these claims pursuant to 28 O.S.C. §§ 1331 and 1343. The parties do not contest personal jurisdiction or venue.

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[1] The court refers to the parties' pleadings as "Def. Hem.," "P1. Resp.," and "Def. Reply."

II. SUMMARY JUDGMENT STANDARD

The court construes the evidence and makes factual inferences in the light most favorable to the nonmoving party. *See Celotex Corp. v. Catlett*, 477 U.S. 317, 322 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Summary judgment is entered only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). At this juncture, the court does not "weigh the evidence and determine the truth of the matter," but solely "determine[s] whether there is a genuine issue for trial." *Andersen v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations emitted).

This determination involves applying substantive law to the substantive facts that have been developed. A dispute about a material fact is genuine if a reasonable jury could return a verdict for the nonmoving party, based on the applicable law in relation to the evidence presented. *See id.* at 243; *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 323. The burden then shifts to the non-moving party, which must designate specific facts remaining for trial and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Summary judgment will be entered when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving pasty. *See id.* at 557.

III. FACTS

Plaintiff Donald E. Morris brings this employment discrimination action against Donald H. Rumsfeld, Secretary of the United States Department of Defense. Plaintiff, who is over the age of 40 and suffers from epilepsy, commenced em-

ployment with the Defense Commissary Agency ("DeCA"), an agency within the Department of Defense, at its inception in 1991. Asserting that his retirement on November 30, 1999, flowed from his supervisors' discriminatory animus directed toward Plaintiff's age and disability, as well as from their retaliatory motives, Plaintiff brings his employment discrimination claims pursuant to the following federal statutes: (1) 5 U.S.C. § 2302(b)(9) which forbids retaliation against federal employee whistle-blowers (Count 1); (2) the Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, 29 U.S.C. §§ 521-34 (Count 2); (3) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Rehabilitation Act");[2] and (4) the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3 (Count 4). The facts giving rise to Plaintiff's claims are as follows.

DeCA is charged with the responsibility of managing the federal government's commissaries which offer household staples and grocery items to members of the armed forces. *See* Department of Defense Directive, 5105.55 at ¶ (C)(1)(a). During his employment with DeCA, Plaintiff worked in several supervisory positions, overseeing the operation of multiple stores within assigned regions. (Pl. Dep. at 11, 30; Def. Exs. 3-4.) Most recently and of relevance to this lawsuit, Plaintiff worked as the Zone Manage for the Eastern Division of the Southern Region, a GS-14 position. (Pl. Dep. at 18.) In this capacity, Plaintiff supervised eleven commissaries and eight commissary officers in Alabama, Georgia and Tennessee and worked out of an office at Maxwell Air Force Base, Alabama. (*Id.* at 18-19, 36-37.) Plaintiff's job

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[2] Plaintiff's Amended Complaint references the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, and the Rehabilitation Act. (Am. Compl. at 1, 4.) As a federal employee, Plaintiff has no remedy for employment discrimination under the ADA. *See* 42 U.S.C. § 12111(5)(B)(i). Summary judgment, therefore, is due to be granted on Plaintiff's ADA claims.

duties as Zone manager included the following: "develop[ing] and implement[ing] staff assistance plans for commissary program evaluation with provisions for follow up in problem areas"; "monitor[ing] shelf-stocking, custodial, maintenance, and other services"; "help[ing] the Region develop Zone budget and direct[ing] program plans for fiscal year budget execution"; "develop[ing] programs which will ensure achievement of Region/zone sales goals and inventory-to-sales rations"; "develop[ing] programs which will ensure achievement of Region/zone sales goals and inventory-to-sales ratios"; and "[e]nsur[ing] that Internal Control procedures are adhered too [sic] and that weaknesses are identified and corrected." (Def. Exs. 3-4; Pl. Dep. at 29-30, 34-35.)

Beginning in January 1998, Plaintiff's immediate supervisor was Owen Chet Boutelle. (Pl. Dep. at 19.) In July 1998, on Plaintiff's annual performance evaluation, Boutelle rated Plaintiff as having "exceeded" expectations (the highest rating) in five "critical" areas of his job responsibilities.[3] (Def. Ex. 5.) On the evaluation form, Boutelle stated, among other things, that Plaintiff "is keeping with his budgeted guidance as a Zone and works to ensure that his stores stay within their goals. He has reviewed the internal controls and is taking corrective action." (Def. Ex. 5.) As part of this evaluation, Plaintiff received a $2,475.00 cash award. (*Id.*) From here, however, Plaintiff's evaluations progressively worsened.

On January 27, 1999, Boutelle completed a mid-year evaluation form which contained two ratings, "acceptable, or better" or "less than acceptable." (Def. Ex. 8.) While Boutelle rated Plaintiff's performance as "acceptable, or better,"

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[3] In assessing Plaintiff's performance, Boutelle relied in part on information provided by Plaintiff's former supervisor who oversaw Plaintiff's work during six months of the 1-year review period. (Boutelle Decl. ¶ 10.)

circling the word "better," he noted that Plaintiff needed to watch his overtime usage and improve in the areas of produce and meat accountability. (Def. Ex. 8.) Disagreeing with Boutelle's assessment, Plaintiff filed an informal grievance against Boutelle seeking to have the comments removed from his personnel file. (Pl. Dep. at 41-42.) He submitted the grievance to Charles M. Wiker, Boutelle's direct supervisor, who "basically" told Plaintiff that individuals employed in GS-14 positions "don't file grievances." (*Id.* at 42-43; Boutelle Decl. ¶ 2.)

On February 11, 1999, Boutelle informed Plaintiff via an email that payrolls at Plaintiff's stores were excessive and "cut of control." (Def. Ex. 9; Pl. Dep. at 44.) Two months later in April 1999, Plaintiff and Boutelle disagreed on a personnel matter regarding managerial staffing at a new commissary under Plaintiff's watch. The disagreement culminated in Plaintiff sending an email to Boutelle on April 13, 1999, in which Plaintiff retorted that Boutelle's decision was "the epitome of micro-management in anyone's book." (Pl. Dep. at 50: Def. Ex. 11.) Plaintiff's email resulted in Plaintiff receiving a "Memorandum of Warning" from Boutelle, dated April 13, 1999. (P1 Dep. at 52; Def. Ex. 12.) The Memorandum of Warning reprimanded Plaintiff for his "confrontational" email and "lack of respect" for Boutelle's "decision[-]making authority." (Def. Ex. 12.) In the "Memorandum of Warning," Boutelle also rebuked Plaintiff for his purported "lack of accessibility," stating that "[t]here have been numerous occasions over the past few months when neither I nor your Commissary Officers . . . have been able to contact you in a timely fashion concerning business related matters." (*Id.*) Boutelle did not place the Memorandum of Warning in Plaintiff's official personnel file, but "warned that a repetition of these offenses may result in more serious discipline." (*Id.*)

In Boutelle's eyes, Plaintiff was derelict in other areas of his job performance as well. Thus, on April 23, 1999, Boutelle placed Plaintiff on a 90-day performance improvement period or "PIP" program that involved monitoring two allegedly deficient areas of Plaintiff's job performance. (Pl. Reap. at 9; Pl. Dep. at 53-55.) First, Boetelle noted Plaintiff's managerial shortcomings which allegedly resulted in one commissary's low inspection rating: "[Y]our failure to review with senior managers or ensure the review of the readily available IG [Inspector General] checklist prior to the actual inspection demonstrates your lack of involvement in this critical management evaluation." (Def. Ex. 13.) Second, Boutelle stated that Plaintiff did not "[t]ake remedial action, as necessary, with stores who did not meet their resource management programs." (*Id.*) Boutelle stated specifically that "four of six stores" under Plaintiff's charge had inventory losses exceeding that allowable under the applicable regulations.[4] (*Id.*) As part of the PIP, Boutelle required Plaintiff to visit each of his commissaries at least once every three weeks and to submit weekly status reports as to his "Zone 2 stores." *Id.* Boutelle also imposed a condition that Plaintiff "be able to be contacted" by Boutelle and other staff at any time "in person, by phone or fax, or by beeper" and that Plaintiff "respond within three (3) hours." (*Id.*) Boutelle informed Plaintiff he would notify him at the end of the 90-day period as to the status of his performance. If Plaintiff's

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[4] As explained by Boutelle, "DeCA regulations establish accountability standards for resource management that require that commissaries operate within certain guidelines which are departmental allowances for gains and losses, sometimes referred to as tolerances." (Boutelle Decl. ¶ 5.) For example, "Commissary Grocery Departments must operate within a tolerance of +0.80%. Commissary Meat Departments must operate within a tolerance of +0.30%. Gains or losses in excess of established tolerances indicate there is a problem with the fiscal management in the particular department of the commissary." (*Id.*)

performance was unacceptable, Boutelle stated that he would take formal action including reassignment, demotion or removal.[5] (*Id.*)

Plaintiff responded to Boutelle's negative appraisals by filing two informal grievances. On April 30, 1999, Plaintiff delivered a letter to Boutelle styled a "Notice of Informal Grievance-Reprisal." (Pl. Dep. at 70; Def. Ex. 15.) In the letter, Plaintiff complained about the PIP placement. (Def. Ex. 15.) Therein, Plaintiff memorialized his belief that Boutelle issued the PIP in reprisal for the earlier informal grievance Plaintiff lodged after receiving his 1999 mid-year evaluation and in an effort to "force" Plaintiff to retire. (*Id.*) In the letter, Plaintiff took issue with the content of the PIP, as well as with its delivery. "[I]n :Plaintiff's] opinion," the "humiliating manner" of delivery, "in front of his peers" amounted to "another attempt" to coerce Plaintiff into retiring. (Pl. Resp. at 10; Def. Ex. 15; Pl. Dep. at 55-60.) Also, Plaintiff submitted a separate Informal Grievance," directed at Boutelle, based on the Memorandum of Warning. Therein, Plaintiff denied Boutalle's accusations and reiterated his opinion that the Memorandum of Warning constituted "more intimidation and harassment . . . to get [Plaintiff] to retire." (Def. Exs. 17, 21.)

In addition to filing these two informal grievances, Plaintiff faxed a complaint to DeCA's Inspector General in May 1999. In that complaint, Plaintiff lodged complaints against man-

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[5] At the same time, Boutelle also placed 3cnnie Kanitz (dob 08/20/1952), who was the zone manager in a different region, on a PIP program. Her zone likewise was "cut of tolerance." (Boutelle Decl. ¶ 19; Kanitz Decl. ¶ 2.) Like Plaintiff, Kanitz was given 90 days in which to improve her performance. The PIP for Kanitz contained language identical to that in the PIP for Plaintiff regarding the action Boutelle might take if her performance remained unsuccessful. At the conclusion of the 90-day PIP for Kanitz, Boutelle assessed her zone was within acceptable tolerance levels. (Kanitz Decl. ¶¶ 2-4.)

agement in general complaining of his superiors' "threatening" and "intimidating" behavior, as well as their "rude and offensive language." (Def. Ex. 27.) Plaintiff also reported that management abused its position in the selection of individuals for jobs and "one senior area manager coerce[ed] a commissary officer into buying him tax-free cigarettes." (*Id.*) Plaintiff also stated: "I have . . . been advised [that] the area V.P. was aware of abuse of government vehicle by a senior manager while under the influence of alcohol on the weekend and was told nothing was done about it."[6] (*Id.*) Based on Plaintiff's complaints, the Inspector General commenced an investigation regarding what turned out to be Boutelle's purchase of tax-free cigarettes which Boutelle gave to another DeCA supervisor.[7] (Boutelle Deol. ¶ 27.)

Plaintiff contends that Boetelle's discriminatory motives also were revealed through Boutelle's comments at management meetings. At these meetings, Boutelle "would always bring up the subject" of retirement, asking generally, "Do we know of any retirements." (Pl. Dep. at 75-76; Def. Ex. 28; Boutelle Decl. ¶ 28.) Plaintiff says that, when discussing retirement plans, Boutelle would "look right at [him]" which indicated to Plaintiff that Boutelle "was sending [him] a signal that he wanted [Plaintiff] to retire." (Pl. Dep. at 76-78, 130; Def. Ex. 23.) At his deposition, Plaintiff reaffirmed his belief that Boutelle actually issued the negative evaluations and extended the PIP in an effort to "force" Plaintiff to retire. According to Plaintiff, there was a "rumor" that Boutelle "had

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[6] While Plaintiff has not so stated, the court presumes that these allegations comprise Plaintiff's whistle-blowing activities.

[7] Boutelle says that he was aware of the investigation, but claims that he did not know that Plaintiff was the one who made the complaint to the IG. (*Id.*) There is nothing in the record indicating the outcome of this investigation.

somebody that he wanted to put in [Plaintiff's] job." (Pl. Dec. at 88; Def. Ex. 28.) That "somebody" apparently was younger than Plaintiff. (*Id.* at 38-89.)

On July 30, 1999, Boutelle extended Plaintiff's PIP placement by 30 days. Boutelle stated that he was concerned that Plaintiff's use of leave during this opportunity period, which had been more than normal due to your family issues, will not allow a fair assessment of your progress." (Def. Ex. 50.) At the conclusion of this 30-day extension, Boutelle still was not satisfied with Plaintiff's performance and issued Plaintiff a Notice of Proposed Demotion. (Def. Exs. 59-60.) Boutelle recommended that Plaintiff be demoted temporarily to a non-supervisory GS-12 position under the charge of Robert G. Vitikacs ("Vitikacs"). The proposed demotion consisted of nine typed pages detailing the reasons for Boetelle's recommendation, including detailed specifications of unacceptable performance and failure to properlv discharge supervisory responsibilities. (Def. Ex. 59.) Boutelle justified his decision in part, by stating that he felt that Plaintiff was determined "to take no supervisory or managerial actions to remedy the problems which exist in [his] zone and which [he] ha[d] pointed out to [Plaintiff] on numerous occasions." (Def. Ex. 59.)

Plaintiff began working in Vitikacs' division on October 12, 1999. (Vitikacs Decl. 33 4-6.) On November 15, 1999, Plaintiff submitted a written request to Vitikacs, requesting sick leave from November 12, 1999, through November 26, 1999. (Vitikacs Decl. ¶ 6.) Vitikacs disapproved the leave request, stating that Plaintiff had not submitted adequate medical documentation as to the "diagnosis that would explain why [Plaintiff] would be incapacitated for the period of time referenced in the sick leave request." (*Id.* ¶ 6.) On November 16, 1999, Plaintiff supplemented his request with a medical excuse which Vitikacs also found inadequate. (*Id.* ¶ 7.) Finally, on November 22, 1999, based on additional

information from Plaintiff's physician, Vitikacs approved the request and granted Plaintiff leave until November 30, 1999. (*Id.* ¶¶ 7-8.) Vitikacs states that "[a]t no time did [he] treat [Plaintiff] differently than other employees regarding his request for sick leave. Medical documentation is required for requests for sick leave for an extended-period of time." (*Id.* ¶ 9.) During this timeframe as well, Boutelle denied Plaintiff a within-grade pay increase. (Boutelle Decl. ¶ 25.) Rather than return to work, Plaintiff notified Vitikacs on November 29, 1999, via a letter that he was retiring effective the next day, November 30. (Vitikacs Decl. ¶ 10.)

Boutelle is not the only supervisor whom Plaintiff contends wanted to get rid of him. Plaintiff contends that Wiker joined Boutelle's efforts. According to Plaintiff, on one occasion, Wiker reprimanded Plaintiff in front of store employees in a "rude, embarrassing and humiliating" manner concerning insufficient watering of sod at one of the commissaries. (Def. Ex. 18.) Plaintiff filed an informal grievance pertaining to this incident, stating his "personal opinion" that Wiker "harass[ed]" him "publicly" because Plaintiff previously had "exercised [his] right to use the DOD complaints system,." (*Id.*)

Plaintiff also contends that the unfavorable treatment he endured was directed toward the fact that he suffers from epilepsy. Plaintiff was diagnosed with epilepsy in approximately 1992, but he is able to successfully control the symptoms with medication. (Pl. Dep. at 91.) In fact, Plaintiff said his condition did not affect his daily activities or his ability to perform his job duties. (*Id*, at 91-92, 94.) Plaintiff did not reveal his physical disability to anyone at DeCA until 199E when he submitted a form to his supervisor (who preceded Boutelle) and to the Defense Logistics Agency. Then, in August 1999, Plaintiff forwarded the same form to the personnel department at Maxwell Air Force Base. (Def. Ex. 43.) Plaintiff did not specifically discuss his epilepsy with

Boutelle, but, nonetheless, Plaintiff "feels" Boutelle was aware of his condition.[8] Plaintiff says that the "personnel chief" knew of his epilepsy and, according to Plaintiff, "rarely was there anything that she [the personnel chief] knew that Boutelle didn't know." (Pl. Dep. at 94.) Aside from this speculation, Plaintiff says that he did inform Boutelle generally of a "health problem," but Boutelle "never expressed any interest of what the problems were." (*Id.* at 95; Boutelle Decl. ¶¶ 30-31.) Boutelle never asked, and Plaintiff was "too proud" to tell him that he had epilepsy. (Pl. Dep. at 95.)

Ultimately, all of Plaintiff's informal grievances were resolved adversely to him. (*See, e.g.*, Def. Ex's. 19, 21, 22.) Pursuant to DeCA protocol, Plaintiff filed a series of formal grievances and EEO complaints in which he complained of age and disability discrimination, as well as retaliation. (Def. Exs. 27, 32, 33, 38, 48, 57, 63, 64, 76, 84, 86.) Therein, Plaintiff outlined the negative performance reviews, including the 30-day extension of the PIP, the demotion, and the public humiliation, asserting that these acts were taken in an effort to force him to retire because of his age and disability and in retaliation for his IG complaints and his exercise of DeCA's grievance procedures. Plaintiff also complained of a constructive discharge, stating that the acts of his superiors were sc degrading and pervasive that Plaintiff was forced to retire.

IV. DISCUSSION

In this lawsuit, the negative employment actions about which Plaintiff complains are as follows: (1) the marginal mid-year 1999 evaluation; (2) the placement on PIP; (3) the 30-day PIP extension; (4) the demotion; (5) the denial of a

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[8] Boutelle, Wiker and vitikacs, claim that they did not know that Plaintiff suffered from epilepsy. (Boutelle Decl. 1 31, Wiker Decl. 14; Vitikaca Decl. ¶ 11.)

within grade increase; (5) the requirement that Plaintiff submit additional documentation supporting his request for extended medical leave; and (7) constructive discharge based on the totality of (1)-(6). (*Id.*) In essence, Plaintiff makes four claims regarding the latter unfavorable acts, that they were: (1) based on his age in violation of the ADEA; (2) based on his epilepsy in violation of the Rehabilitation Act; (3) in retaliation for his filing grievances and EEC complaints in violation of Title VII; and (4) in retaliation for federal whistle-blowing acts.

Plaintiff bears the burden of persuasion at all times-on his claims. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 245, 253 (1981). Because Plaintiff lacks direct evidence of the various unlawful motivations alleged,[9] the burden of production for his claims shifts in accordance with the three-

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[9] Plaintiff argues that Boutelle's general inquires at management meetings as to whether the managers were aware of anyone who intended to retire constitute direct evidence pf discrimination. (Pl. Dep. at 76; Pl. Resp. at 4-5.) The court disagrees. In *Clark v. Coats & Clark, Inc.*, the Eleventh Circuit rejected a purported direct evidence claim which consisted of remarks more poignant than those presented here. 990 F.2d 1217, 1226 (11th Cir. 1993). There, a plant manager told a 56-year-old employee he had to retire immediately. The court held that the manager's mandate was not direct evidence of age discrimination because the statement was not accompanied by any reason as to "why he had to retire." *Id.* Thus, the "discriminatory intent motivating that decision must be inferred." *Id.; see also Brook v. City of Montgomery*, 916 F. Supp. 1193, 1205 (M.D. Ala. 1996) (decisionmaker's statement that plaintiff "should not be promoted because he would be enhancing his eventual retirement potential" was no: direct evidence; "[r]ather such a statement requires the court to infer discrimination in order to conclude an age discriminatory animus"). Here, as well, the court concludes that the retirement inquiries by Boutelle, even if directed toward Plaintiff, do not qualify as direct evidence of discrimination. At most, the inquiries are direct evidence that Boutelle was hoping that Plaintiff would retire. Just as in *Clark*, one must infer that Boutelle's probing was based on an age bias. Defendant, therefore, is entitled to summary judgment en Plaintiff's ADEA direct evidence claim.

step order of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). *See e.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141-42 (2000) (applying *McDonnell Douglas* to claims of age-based discriminatory discharge under the ADEA).

In the first *McDonnell Douglas* phase, Plaintiff must produce evidence sufficient to make out a prima facie case, thus giving rise to a presumption that Defendant unlawfully discriminated or retaliated against Plaintiff in taking the alleged adverse employment actions. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1393). Next, Defendant must rebut this presumption by producing evidence that the negative employment actions culminating in Plaintiff's alleged constructive discharge were motivated instead by a legitimate, nondiscriminatory reason. *Id.* at 509. Defendant's "burden is one of production, not persuasion; 'it can involve no credibility assessment.'" *Reeves*, 530 U.S. at 142 (quoting *St. Marv's Honor Center*, 509 U.S. at 509). Finally, to avoid summary judgment, Plaintiff must respond with evidence, which may include previously produced evidence establishing a prima facie case, which would allow a reasonable jury to conclude that the reasons given by the employer were not the real reasons for the adverse employment decisions. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997); *see also Reeves*, 530 U.S. at 143.

Although the same general burden-shifting framework applies to all of Plaintiff's claims, the prima facie cases differ enough to warrant separate treatment of that phase. However, the parties rely on the same evidence on all claims at the next two stages, and, thus, the court will not separate the analysis as to Defendant's burden and Plaintiff's evidence of pretext.

A. Prima Facie Case

1. Age Discrimination

One of the ways by which a plaintiff can establish a prima facie case for an ADEA violation is by demonstrating that he (1) is a member of the protected age group, i.e., is at least 40 years of age, (2) was subjected to an adverse employment action, (3) was qualified for the position in which he was employed, and (4) "was replaced by or otherwise lost a position to a younger individual." *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000); *Reeves*, 530 U.S. at 142. For purposes of summary judgment, Defendant concedes that Plaintiff has established a prima facie case of age discrimination under the framework articulated above. (Def. Mem. at 38.) Therefore, for now, the court assumes that Plaintiff is in a protected class, was subject to adverse employment actions, was replaced by a person outside the protected group, and was qualified to do the job.

2. Retaliation

The method of analysis in retaliation claims is the same under the ADEA, Titre VII and the Federal Whistle-Blower Protection Act. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993) (holding that proof of retaliation under ADEA is controlled by Title VII framework set forth in *McDonnell Douglas*); *Mann v. Olsten Certified Healthcare Corp.*, 49 F. Supp.2d 1307, 1317 n.37 (M.D. Ala. 1999) ("Courts use the Title-VII burden-shifting method of proof in analyzing retaliation claims under federal whistle-blower statutes.").

To establish a prima facie case of retaliation, a plaintiff must show "that (1) [he] engaged in . . . statutorily protected expression; (2) [he] suffered an adverse employment action; and (3) there is a causal [connection] between the two events." *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1155 (11th Cir. 2002). Plaintiff asserts that the various

employment decisions of which he complains were prompted by the numerous grievances and IG complaints he lodged against his supervisors during the his latter tenure at DeCA. Given his supervisors' awareness of at least some of the various complaints and the temporal proximity between the negative employment decisions and the filing of the grievances, Defendant concedes that Plaintiff has established the prima facie elements (Def. Mem. at 54), and the court so presumes. Thus, the analysis proceeds to the next stage as to Plaintiff's retaliation claims.

3. Disability Discrimination

The Rehabilitation Act prohibits federal agencies from discriminating in employment against otherwise qualified individuals with a disability. 29 U.S.C. § 791; *Mullins v. Crowell*, 228 F.3d 1305, 1313 (11th Cir. 2000). To establish a prima facie case of discrimination under the Rehabilitation Act, an-individual must show that he or she: (1) has a disability; (2) is otherwise qualified for the position; and, (3) was subjected to unlawful discrimination as a result of such disability.[10] *Sutton v. Lader*, 183 F.3d 1203, 1207 (11th Cir. 1999).

The Rehabilitation Act defines an "individual with a disability" as any person who: (i) has a physical or mental impairment which substantially limits one or more of such persons major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. 29 U.S.C. § 706(8)(B). "Major life activities means functions, such as caring for one's self, performing manual tasks,

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[10] The court notes that discrimination claims under the Rehabilitation Act are governed by the same standards used in ADA cases. *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1526 n.2 (11th Cir. 1997). Thus, "[c]ases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa." *Cash v. Smith*, 231 F.3d 1301, 1305 n.2 (11th Cir. 2000).

walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1614.203(a)(3). These provisions, requiring a substantial limitation on a major life activity, exclude individuals with minor impairments which merely affect the ability to satisfy the singular demands of a particular job. *See Cash*, 231 F.3d at 1306. Whether an impairment substantially limits a major life activity, is to be determined in light of: (1) the nature and severity of the impairment; (2) its duration or expected duration; and, (3) its permanent or long term impact, or its expected permanent or long-term impact. 20 C.F.R. § 1630.2(j)(2). And, of course, there must exist evidence that the decisionmakers were aware of the diagnosis. *See, e.g., Miller v. National Gas. Co.*, 61 F.3d 627, 629-30 (8th Cir. 1995) (employee's complaints about stress insufficient to put employer on notice of any disability when it had not been informed about a diagnosis of manic depression).

Plaintiff alleges that he satisfies all of the three disability categories, contending that he has a substantially limiting physical impairment, has a record of such impairment or, alternatively, was considered by his superiors to have such an impairment. Plaintiff's arguments in this regard are scant (Pl. Resp. at 5-7), and the court is particularly puzzled by Plaintiff's contention under the first sub-category, as Plaintiff concedes that his epilepsy did not largely affect his job performance or any other area of his life. (Pl. Dep 91-94); *see Cash*, 231 F.3d at 1305 (plaintiff could not survive summary judgment on disability claim; although she suffered numerous health problems, plaintiff "failed to specify a major life activity in which she [was] substantially limited, nor . . . provided any evidence of such a limitation"). At best, Plaintiff points to evidence that, during the period of what he deems harassment by his superiors, the seizures "started up again" (not at work, at home), but increased medication "for the most part" kept the seizures under control. (Pl. Dep. at 93.) While the court recognizes the seriousness of epilepsy

and empathizes with Plaintiff's health condition, there simply is insufficient evidence that the seizures substantially limited a major life activity. *See Cash*, 231 F.3d at 1305 & n.4 (noting that, while plaintiff's "seizure disorder [was] a chronic one," the seizures have "largely been controlled by medication," with only one occurring at work, and noting that "the Supreme Court has made it clear that the determination whether an individual is disabled for ADA purposes is to be made with reference to measures that mitigate the impairment") (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999)). The court, thus, rejects Plaintiff's position that he fits within the first statutory definition of disability.

Next, the court must consider whether Plaintiff is disabled under the Rehabilitation Act by virtue of having a "record of impairment." 42 U.S.C. § 12102(2)(B). To meet this definition, an individual must have a history of, or have been misclassified as having, an impairment that substantially limits a major life activity. 29 C.F.R. § 1630.2(k). Plaintiff relies on the form documenting his epilepsy which he forwarded to his supervisor prior to Boutelle, to the Defense Logistics Agency and to the personnel department at Maxwell Air Force Base, but presents no argument on this point. (Pl. Resp. at 7-8; Def. Ex. 43.) To the extent that a record of an impairment exists by virtue of the form, and assuming *arguendo* knowledge by the relevant decisionmakers (a heavily contested issue), as discussed *supra*, nothing in the record suggests that the impairment substantially limited a major life activity. Such a showing is necessary to establish a disability based upon a record of impairment. *See* 29 C.F.R.App. § 1630.2(k); *see also Sorensen v. University of Utah Hosp.*, 194 F.3d 1084, 1087 (10th Cir. 1999) (noting that, to demonstrate record of impairment, impairment must substantially limit a major life activity).

The court finds that Plaintiff also fails to establish a disability by virtue of having been "regarded as" disabled by his superiors. *See*, 42 U.S.C. § 12102(2)(C) A person is regarded as having a disability if he or she:

> (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by the covered entity as constituting such limitation;
>
> (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) has (no such impairment) but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1530.2(1). There simply is no evidence that Defendant considered Plaintiff as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." *Cash*, 231 F.3d at 1306. At best, Defendant considered Plaintiff unable to perform one type of supervisory job and demoted him to a non-supervisory job. On this record, the court finds no evidence that Defendant regarded Plaintiff as being precluded from performing a broad class of jobs or, as discussed *infra*, that Defendant's decision to demote Plaintiff was in any fashion connected to his epilepsy. Indeed, Plaintiff essentially conceded this point at his deposition. There, he stated that he had "no factual basis" for believing that he was placed or a PIP or otherwise treated adversely based on his disability. (Pl. Dep. at 95-96.) Rather, Plaintiff merely suspected that the fact that he has epilepsy was a factor resulting in the PIP placement because beginning as of April 23, 1999, "[i]n a matter of weeks, [Boutelle] went from everything being great and okay to nothing is right and everything is wrong." (*Id.* at 96, 97.)

Because Plaintiff has failed to raise a genuine issue of material fact on the "disability" element of his prima facie case, summary judgment is appropriate on Defendant's

Motion with respect to claims premised under the Rehabilitation Act. However, even assuming *arguendo* that Plaintiff had presented a prima facie case, the lack of evidence on pretext, as discussed below, applies alternatively and also causes Plaintiff's disability claims to fail.

B. Defendant's Legitimate, Non-discriminatory Reasons

The court, thus, turns to Defendant's burden. Here, the negative employment actions about which Plaintiff complains are as follows: (1) the marginal mid-year 1999 evaluation; (2) the placement on PIP; (3) the 30-day PIP extension; (4) the demotion; (5) the denial of a within grade increase; (5) the requirement that Plaintiff submit additional documentation supporting his request for extended medical leave; and (7) constructive discharge (i.e., forced retirement resulting from the totality of (l)-(6)). (Pl. Resp. at 9.) In great detail, Defendant explains that Plaintiff's sub-standard job performance resulted in the employment actions in (l), (2), (4) and (5), that the PIP extension was due to Plaintiff's absence from work which impeded a full evaluation of Plaintiff's progress, and that the medical documentation was required pursuant to DeCA' s leave policy. (Def. Mem. at 38-49 (citing record excerpts).) The court determines that, at this stage, Defendant has articulated with adequate specificity and evidentiary support legitimate, non-discriminatory reasons for the employment actions at issue "which, taken as true, would permit the conclusion that there [were] nondiscriminatory reason[s] for the adverse action[s]." *St. Mary's Honor Center*, 509 U.S. at 509; *see also Kelliher v. Veneman*, No. 02-11817, 2002 WL 31513310, 2 (11th Cir. Nov 13, 2002) (employer's "documented evidence of [plaintiff's] dereliction of duty and insubordination constituted an adequate non-discriminatory reason for his discharge.").

C. Pretext

At the heart of this case is whether Plaintiff has demonstrated pretext. (Pl. Resp. at 7.) Plaintiff attempts to undercut Defendant's articulated non-discriminatory reasons by adducing evidence which he claims shows that Defendant's explanations are unworthy of belief, and therefore, a pretext for discrimination. Plaintiff essentially contends that there is a question of fact as to whether he actually had performance problems, and whether his supervisors' critiques of him were part of an orchestrated plan to discriminate against hint because of his age and to strike back at Plaintiff's invocation of DeCA's grievance/complaint procedures. (Pl. Resp. at 9-12.) In support of his position, Plaintiff points generally to his overall good track record with DeCA prior to his supervision under Boutelle (said evaluations which included raises and positive reviews throughout the years). Plaintiff also emphasizes that, just prior to his placement on the PIP, Wiker had visited Plaintiff's stores and "complimented each commissary officer on how well the store[s] looked." (Pl. Dep. at 58; Pl. Resp. at 10.) Wiker's assessment of the stores, according to Plaintiff, belies Boutelle's negative evaluations and PIP placement. As a further attempt to discredit Boutelle's negative assessments, Plaintiff argues that "the standards set forth as to tolerance" were mere "draft regulations" or "guidelines" that "were to be complied with only as much as possible." (Pl. Resp. at 10-11.)

Further, Plaintiff contends that Boutelle had a general demeaning disposition toward Plaintiff, citing as an example Boutelle's public denouncement of Plaintiff in front of his peers when Boutelle handed Plaintiff the PIP. (*Id.* at 10.) Plaintiff also retorts that, while the calculations in the PIP show that the commissaries in Plaintiff's zone were out of tolerance, "corrected" figures would have shown that his stores were in fact in compliance with the regulations, but he submits no evidence in this regard. (*Id.* at 11.) Moreover, to

the extent that problems existed within Plaintiff's stores, Plaintiff lays the blame in part on staff shortages in his zone, a problem he suggests could have been remedied by Boutelle, but was act. (*Id.*)

Furthermore, regarding Boutelle's reprobation lodged at Plaintiff's request for leave and overtime pay, Plaintiff contends that he is the only employee who has had "leave usage questioned" and that overtime payment results from "emergency situations over which [Plaintiff] had no control." (Pl. Dep. at 151.) Finally, as to Boutelle's assertion that Plaintiff was denied an in-grade pay increase based on Plaintiff's low evaluation, Plaintiff emphasizes the purported irony: "[Plaintiff] was giver an unfair, arbitrary, and discriminating low evaluation, and was then punished for receiving it by withholding his in-grade pay increase." (Pl. Resp. at 12.)

The court has carefully considered all of Plaintiff's foregoing assertions, which as demonstrated are quite numerous, but nonetheless finds that they all fall short of establishing a genuine issue of material fact or the issue of pretext for one primary reason: All are conclursory and unsubstantiated. Unsupported self-serving statements by the party opposing summary judgment are insufficient to avoid summary judgment. *See Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 714 (11th Cir. 1984); *Rose-Maston v. NME Hospitals, Inc.*, 133 F.3d 1104, 1109 (8th Cir. 1998) (stating that plaintiff could not show pretext where the only factual evidence offered was her own unsubstantiated allegations in her affidavit). "Mere concluscry *allegations* of discrimination, without more, are insufficient to defeat a mot en for summary judgment." *McKeon v. Vaicaitis, Schorr, Richards, et al.*, 785 F. Supp. 965, 968 (M.D. Fla. 1992) (citing *Grigsby v. Revnolds Metals Co.*, 821 F.2d 590, 597 (11th Cir. 1987)).[11]

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[11] *See also Douglass v. United Serv. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) ("[C]onclusory allegations, speculation, and unsubstan-

For example, Plaintiff fails to submit any substantiation in support of his argument that his Zone was, in fact, in tolerance. He merely asserts such fact at his deposition without providing any substantiation.[12] All of the evidence submitted by Defendant, said evidence of which is extensive, points to low-grade performance by Plaintiff, and the court cannot speculate, as does Plaintiff, that Boutelle merely made up the figures and evaluations.

Instead of factual support for his assertions, Plaintiff's "evidence" is largely based on self-serving hearsay, rumors and Plaintiff's personal "beliefs" and "opinions" that Boutelle and others wanted to get rid of him because of his age and in

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tiated assertions are inadequate to satisfy the nonmovant's burden."); *Betkerur v. Aultman. Hosp. Ass'n*, 78 F.3d 1079, 1096 (6th Cir. 1996) ("[R]umors, conclusory allegations, and subjective beliefs . . . are wholly insufficient evidence to establish a claim of discrimination as a matter of law."); *Bennett v. Parker*, 898 F.2d 1530, 1533-34 (11th Cir. 1990) (A "conclusory allegation" cannot defeat summary judgment.); *St. Hiliare v. The Pep Boys-Manny, Moe & Jack*, 73 F. Supp. 2d 1350, 1359 (S.D. Fla. 1999) (A plaintiff's "mere belief, speculation, or conclusory accusation that he was subject to discrimination will not suffice to create an inference of discrimination or satisfy his burden when responding to a properly supported motion for summary judgment."); *Lewis-Webb v. Qualico Steel Co.*, 929 F. Supp. 385, 392 (M.D. Ala. 1996) ("'Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuitions or rumors.'") (quoting *Rand v. CF Indus., Inc.*, 42 F.3d 1139, 1146 (7th Cir. 1994)).

[12] However, even if Plaintiff had provided calculations to back his assertion that his commissaries, at all times, was in tolerance, such a showing still is not necessarily sufficient to infer discrimination. *Cf. Jones v. Bessemer Carrawav Medical Center*, 137 F.3d 1306, 1309-10, *modified on other grounds*, 151 F.3d 1321 (11th Cir. 1998) (holding that as long as employer holds good-faith belief that employee had, in fact, breached a work rule, a plaintiff cannot prevail, even if he or she did not actually violate this rule.); *see also Chapman*, 229 F.3d at 1025 n.11 ("if the plaintiff does proffer sufficient evidence that the defendant's stated reasons are pretextual, the plaintiff still may not be entitled to take his case to a jury.").

retaliation for the grievances and complaints Plaintiff filed. (Pl. Dep. at 55-60, 70, 88; Def. Exs. 15, 17-18, 21, 28.) It is well settled that Plaintiff's subjective belief is not evidence of discrimination sufficient to preclude summary judgment. *See Rainev v. Vinson Guard Services, Inc.*, 120 F.3d 1192, 1198 (11th Cir. 1997) ("Summary judgment cannot be avoided . . . based on hunches unsupported with significant probative evidence."); *see also Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1377 (11th Cir. 1996); *Ramsey v. Leath*, 706 F.2d 1166, 1170 (11th Cir. 1983).

It is not clear, but it may be that Plaintiff is suggesting that a reasonable jury could infer pretext based on Boutelle's treatment of Don Claffey, an under-40 manager in another region whose job duties were similar to Plaintiff's. While Plaintiff and Kanitz, who like Plaintiff is over 40 (*see, supra*, footnote 5), were placed on a PIP program, Boutelle did not reqire Claffey to undergo a PIP when his zone was "out of tolerance." (Def. Mem. 44-45); *see, e.g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976) (Evidence of comparator employees involved in acts of "comparable seriousness [as the plaintiff] . . . is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext."). However, based on a review of the record, the court concludes that Claffey is not similarly situated to Plaintiff (or Kanitz), as Claffey's zone included overseas territories which complicated and delayed the ordering and delivery processes and given Claffey's self-discovery and self-resolution of the problem. (Def. Mem. 44-45); *see Lathem v. Department of Children and Youth Services*, 172 F.3d 786, 793 (11th Cir. 1999) (holding that, if two employees are not similarly situated, the different application of workplace rules does not constitute illegal discrimination). Moreover, along the same lines, Plaintiff's assertion, noted earlier, that the DeCA regulations at issue were merely advisory is of no consequence on the issues of

discrimination and retaliation because Plaintiff has not demonstrated dissimilar application of the regulations. Likewise, while Plaintiff alleges that he was the sole DeCA employee to have leave usage questioned, he fails to submit even the name of another employee who was required to submit the same type of medical documentation to validate a similar leave request, again rendering Plaintiff's assertion unsubstantiated and conclusory.

Finally, pertaining specifically to the age discrimination claim, Plaintiff contends that, even if Boutelle's remarks at management meetings about retirement are not direct evidence of discrimination, they are relevant on the question of pretext. (Pl. Resp. at 5.) In this case, the court disagrees. The ADEA does not require that an employer ignore the fact that an employee is eligible for or approaching retirement and may discuss that possibility with the employee. Simply stated, there is nothing *per se* discriminatory about an employer's questions regarding its employees' retirement plans, and Plaintiff has not demonstrated circumstances sufficient to render the inquiries suggestive of pretext. *See Montgomery v. John Deere & Co.*, 169 F.3d 556, 560 (8th Cir. 1999) (holding, that fact that employee was regularly offered early retirement did not by itself violate ADEA because an employer may make reasonable inquiries into retirement plans of its employees).

In sum, the court finds that Plaintiff has not demonstrated that Defendant's asserted reasons for its decisions were intended to mask age discrimination or retaliation. Beyond the minimal proof required to state a prima facie case as to the age and retaliation claims, Plaintiff has offered no evidence that he was discriminated against because of his age or as a retaliatory act. Accordingly, summary judgment is appropriate.

V. ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that Defendant's Motion For Summary Judgment be and the same is hereby GRANTED.

DONE this 4th of December, 2002.

/s/ [Illegible]
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Dec. 4, 2002]

Civ. A. No. 01-D-342-N

DONALD E. MORRIS,

Plaintiff,

v.

DONALD H. RUMSFELD, Secretary,
United States Dep't of Defense,

Defendant.

JUDGMENT

In accordance with the attached Memorandum Opinion and Rule 58 of the Federal Rules of Civil Procedure, it is CONSIDERED, ORDERED, and ADJUDGED that summary judgment be and the same is hereby ENTERED in favor of Defendant Donald H. Rumsfeld, Secretary, United States Department of Defense, and against Plaintiff Donald E. Morris, and that Plaintiff take nothing by his said suit.

It is further CONSIDERED and ORDERED that all costs herein incurred be and the same are hereby taxed against Plaintiff, for which let execution issue.

DONE this 4th day of December, 2002.

/s/ Ira DeMent
IRA DEMENT
Senior United States District Judge

EOD 12/4/02

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Dec. 18, 2002]

Civil Action No. 01-D-342-N

DONALD E. MORRIS,

Plaintiff,

v.

DONALD H. RUMSFELD, Secretary,
United States Department of Defense,

Defendant.

MOTION TO ALTER, AMEND, OR
VACATE JUDGEMENT

Comes now the Plaintiff, Donald E. Morris, and respectfully moves the Court under Rule 59, Fed. R. Civ. P., to alter, amend, or vacate its judgment of December 4, 2002, and, as grounds therefore, submits the following:

1. The evidence that the Plaintiff's supervisor emphasized the need for retirement of the agency's older workers should have been treated as constituting direct evidence, since no inference needs to be drawn to connect advancing age with the emphasis upon retirement.

2. The Plaintiffs epileptic condition should have been considered as constituting a disability sufficient to limit the major activities of life.

3. In its discussion regarding the defendant's articulated non-discriminatory reasons, the Court not cite any binding precedent that post- dates the case of *Reeves v. Sanderson Products, Inc.*, 530 U.S. 133 (2000), and not cite or refer to the *Reeves* decision. In his opposition to the Defendant's motion for summary judgment, the Plaintiff contended that *Reeves* prohibited the granting of summary judgment when the credibility of the employer's articulated reasons was placed in issue.

Respectfully submitted,

/s/ Alvin T. Prestwood
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PRESTWOOD & DICKEY, L.L.C.
350 Adams Avenue
Post Office Box 1910
Montgomery, Alabama 36104
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CERTIFICATE OF SERVICE

I hereby certify that I have this the 18 day of December, 2002, served a copy of the foregoing on all counsel by mailing the same to each by U.S. Mail, postage prepaid and properly addressed.

Leura Garrett Canary
Assistant U.S. Attorney
Post Office Box 197
Montgomery, AL 36106

Martha Ann Miller
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Post Office Box 197
Montgomery, AL 36106

[ILLEGIBLE]
OF COUNSEL

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Nov. 3, 2003]

No. 03-10283-AA

DONALD E. MORRIS,
Plaintiff-Appellant,

versus

DONALD H. RUMSFELD, Decretary,
United States Department of Defense,
Defendant-Appellee.

On Appeal from the United States District Court
For the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: TJOFLAT, BIRCH and HULL, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX G

5 U.S.C. §2301. Merit system principles

(a) This section shall apply to—

(1) an Executive agency; and

(2) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be—

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter—

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

5 U.S.C. §2302(b)(8). Prohibited personnel practices

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * * *

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the

place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil servicelaw, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel

practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of.this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it

failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

5 U.S.C. § 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph, the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either—

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law—

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and—

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole—

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d)(1) If the Board takes any action provided under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including—

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2)(A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing

agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6)(A) Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of—

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e)(1) Notwithstanding any other provision of law, if at any time after—

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

29 U.S.C. § 621. Congressional statement of findings nd purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined for the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.